(2)

Supreme Court, U.S.
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No. 89-903

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VERNON C. DAVIS and
ELMIRA S. DAVIS,

Petitioners,

v.

THOMAS FARASY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Petition For Writ Of Certiorari has been timely filed?

2. Whether the Decision of the Court below involved any federal question which is the proper subject of review in this Court?

RULE 28.1 LIST

The parent company of Respondent, Perpetual Real Estate Services, Inc. is Perpetual Savings Bank, F.S.B.

There are multiple *wholly owned* subsidiaries of Perpetual Real Estate Services, Inc. and no affiliates.

Perpetual Real Estate Services, Inc. was formerly known as Sumaweel Corp.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 28.1 LIST	ii
ORDERS AND JUDGMENTS BELOW	iii
TABLE OF AUTHORITIES	iv
OBJECTIONS TO JURISDICTION	1
STATUTE AND RULE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	4
ARGUMENT	5
CONCLUSION	7
APPENDIX	1a
Order of Judge Perry granting Motion To Dismiss Without Leave To Amend and entering judgment in favor of Defendants (docket entires of November 4, 1988)	5a
Order of Circuit Court In Banc granting Motion To Dismiss In Banc Appeal and noting all claims complete, case closed. (docket entries of February 16, 1989)	6a
Maryland Court of Appeals Order of June 15, 1989 denying the Petition for Writ of Certiorari	7a
Maryland Court of Appeals Order of August 31, 1989 denying Motion for Reconsideration	8a

TABLE OF AUTHORITIES

	Page
Cases:	
Betts v. Brady, 316 US 455 (1942)	6
Montgomery County v. McNeece, 311 Md 194, 533 A² 671 (1987)	5
Statutes:	
28 USC Section 1257 (a)	6
28 USC Section 2101 (c)	4
Annotated Code of Maryland	
Courts and Judicial Proceedings Article	
Section 12-307	2,6
Section 12-305	6
Rules:	
U.S. Supreme Court Rules, Rule 13	4
Maryland Rules of Procedure, Rule 2-551(h)	2,5

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RESPONDENTS' BRIEF IN OPPOSITION

OBJECTIONS TO JURISDICTION

1. The Petition for Writ of Certiorari filed in this court is filed out of time.

2. Neither the Decision of the Circuit Court In Banc nor the decision of the Maryland Court of Appeals was based upon or in any way involved any federal questions subject to review by this Court.

3. The decisions of both the Circuit Court In Banc and the Maryland Court of Appeals were based upon adequate independent State grounds.

STATUTE AND RULE INVOLVED

Maryland Rules of Procedure, Rule 2-551 provides in pertinent part:

Rule 2-551. IN BANC REVIEW

(a) **Generally.**—When review by a court in banc is permitted by the Maryland Constitution, a party may have a judgment or determination of any point or question reviewed by a Court in banc by filing a notice for in banc review. . . . Upon the filing of the notice, the Circuit Court Administrative Judge shall designate three judges of the circuit, other than the judge who tried the action, to sit in banc.

. . . . . .

(h) **Further Review.**—Any party who seeks and obtains review under this Rule has no further right of appeal . . .

* * *

The Annotated Code of Maryland in its Courts and Judicial Proceedings Article provides:

Section 12-307. Jurisdiction of Court of Appeals.

The Court of Appeals has:

(1) Jurisdiction to review a case or proceeding pending in or decided by the Court of Special Appeals in accordance with Subtitle 2 of this title;

(2) Jurisdiction to review a case or proceeding decided by a circuit court, in accordance with Section 12-305 of this Article;

(3) Exclusive appellate jurisdiction with respect to a question of law certified to it under the Uniform Certification of Questions of Law Act; and

(4) Exclusive appellate jurisdiction over a criminal case in which the death penalty is imposed and any appellate proceeding under Article 27, Section 75A of the Code.

STATEMENT OF THE CASE

Petitioners, proceeding *pro se* below and having filed an original complaint in the Circuit Court of Prince George's County, Maryland on December 11, 1987, subsequently filed amended complaints on September 7, 1988 and on October 12, 1988.

After according the petitioners no less than three opportunities to state a cause of action against the respondents, the Circuit Court dismissed petitioners' last amended complaint without leave to amend and entered judgment in favor of respondents. (App. 5a) Judge Perry, the presiding judge, dismissed the case only after inquiring of petitioners as to what, if any, additional facts or amendments could be proffered to persuade the court that a cause of action could be stated against the respondents. When the petitioners were unable to make such a proffer, the judgment was entered.

Petitioners next filed a request for In Banc Review by the Circuit Court and although their memorandum was for the most part unintelligible, and addressed issues not addressed before the trial court, the court set the matter for hearing In Banc.

Although petitioners' In Banc request was procedurally defective, the Circuit Court, sitting In Banc, a three judge panel presiding, provided petitioners an opportunity for a full hearing and only after said hearing did the court on February 16, 1989 dismiss

the In Banc appeal and thereby affirmed the trial court's decision. (App. 6a)

Petitioners then petitioned the Maryland Court of Appeals for a Writ of Certiorari and the Court of Appeals denied said petition. (App. 7a)

Petitioners next filed a Petition for Reconsideration of Writ of Certiorari and the Court of Appeals denied such request. (App. 8a)

Finally, petitioners, on November 29, 1989, caused to be docketed in this Court the Petition For Writ Of Certiorari here under consideration.

REASONS FOR DENYING THE WRIT

1. The order of the Circuit Court of Prince George's County, wherein Respondents' Motion to Dismiss was granted, i.e. the order of February 16, 1989, was the final appellate avenue available to petitioners in the state courts. In effect, it is a review of that decision which petitioners seek and accordingly petitioners should have sought a petition for Writ of Certiorari to the Circuit Court of Prince George's County.

However, the petition filed herein not having been docketed until November 29, 1989, the petition was filed out of time. U.S. Supreme Court Rule 13, 28 USC Section 2101 (c).

2. The decision of the Circuit Court In Banc was based upon a correct application of Maryland law only and did not rest upon any federal law considerations.

3. Even were this Court to consider the Maryland Court of Appeals' decision in declining to review the In Banc decision of the Circuit Court, it would be apparent that the Court of Appeals' decision was

founded on no issues subject to the jurisdiction of this court.

ARGUMENT

The Maryland Court of Appeals, recognizing the expense as well as the possible time delays attendant an appeal to the Court of Special Appeals, has, in promulgating Rule 2-551, provided to litigants an inexpensive, more expeditious vehicle by which they might seek review of the trial courts' decisions. The In Banc procedure allows three circuit court judges, other than the judge who tried the action, to review the trial judge's ruling to determine if error was committed or discretion abused.

Petitioners having freely elected to pursue their appellate remedy by invoking the In Banc process, and having obtained a review of the trial courts' action, had no further right of appeal to either of the Maryland Appellate Courts, Rule 2-551 (h) Md. Rules of Procedure.

Pursuant to the Maryland Rules, when the petitioner elects to have the trial court decision reviewed In Banc the appellate courts of the state have no jurisdiction to review the decision of the court In Banc except as to the In Banc court's determination as to its own jurisdiction. *Montgomery County v. McNeece*, 311 Md 194, 533 A^2 671 (1987).

Petitioners here do not contest the jurisdiction of the In Banc Court nor can they do so, for it was petitioners who made the election and invoked that tribunals jurisdiction.

Even if the petitioners were not precluded by Rule 551 of the Maryland Rules of Procedure from seeking

review by the Court of Appeals, it is apparent from a reading of the Annotated Code of Maryland Courts and Judicial Proceedings Article Section 12-307 that the Court of Appeals would have had no jurisdiction in this matter. (STATUTE AND RULE INVOLVED, p. 2 herein).

Subtitle 2 as referenced in subparagraph (1) of Section 12-307 relates to cases proceeding, pending in or decided by the Maryland Court of Special Appeals.

Section 12-305 as referenced in Subsection (2) of Section 12-307 pertains to cases in which the Circuit Court has rendered judgment on appeal from the State District Court or from certain administrative decisions.

Neither subsections (3) or (4) of section 12-307 are applicable to the case at bar and accordingly this case was not within the jurisdiction of the Maryland Court of Appeals.

Thus, the decision of the Circuit Court sitting In Banc, not being subject to review by any higher state court, constituted a decision by the highest state court in which a decision could be had. 28 USC Section 1257, *Betts v. Brady*, 316 US 455 (1942).

However, petitioners, in seeking a review of the in banc decision should have filed their petition with this Court within 90 days of that court's ruling and not in excess of 9 months thereafter.

Moreover, neither of the docket entries in the Circuit Court, i.e. that entry reflecting the ruling of November 4, 1988 (App. 5a) or the ruling of February 16, 1989 (App. 6a) even remotely suggest that either the trial court or the In Banc Court dealt with any federal question in so ruling.

A cursory review of Maryland Court of Appeals Rulings (App. 7a and 8a) fails to suggest any consideration of any federal questions by that court.

From the preceding discussion of Maryland Rules, Statutes and case law, it is respectfuly suggested that all of the courts below acted on independent grounds founded in Maryland state law.

Contrary to petitioners averments, there was no taking of real property involved in the proceedings below and there was no denial of due process.

Petitioners comments regarding the conduct of counsel below are steeped in ignorance of the law and amount to no more than scurilous allegations, as was apparent to the courts below.

CONCLUSION

None of the State courts below decided a question of federal law, important or otherwise, about which there is a conflict or otherwise, the Petition herein having been filed out of time, and the Maryland Court having correctly applied Maryland law, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

CIRCUIT COURT

FOR

Prince George's County, Maryland

CAL 87-20139

VERNON C DAVIS AND ELMIRA S DAVIS
Pro Se, PLAINTIFFS

VERSUS

THOMAS FARASAY, President and PERPETUAL REAL ESTATE SERVICES INC
DEFENDANTS

DATE	CODE(3)	CLERK'S MEMORANDUM
12-11-87	(1)	Complaint for Damages/Breach of Contract and Exhibits, fd.
1-5-88		Summons issued and sent to Plaintiff for service on:
1-5-88	(2)	Thomas Farasay
1-5-88	(3)	Perpetual Real Estate Serv Inc jmp
1-22-88	(4)	Certificate of Service, as to Perpetual Real Estate Serv Inc., fd. jg
1-22-88	(5)	Certificate of Service, as to Thomas Farasay, fld. jg
2-24-88	(6)	Motion to Dismiss or, in the Alternative, To Quash Process, Affidavit, Filed. (bmm)
2-29-88	(7)	Line requesting hearing, filed. (JC)

3-1-88	(8)	Opposition to Motion to Dismiss or in the Alternative to Quash Process and Memorandum in Support of Opposition, fd (feb)
3-8-88	(9)	Inter-Office Memorandum, fd (feb)
3-8-88	(10)	Motion to Quash, or In the Alternative, to Stay Proceeding, fd (feb)
3-9-88	(11)	NOTICE OF HEARING FILED. RC
3-2-88	(12)	Copy of Motion to Consolidate, filed. (bam)
3-11-88	(13)	Opposition to Motion to Consolidate, Statement of Grounds and Authorities, filed. (bam)
3-17-88	(14)	Line, fd
3-17-88	(15)	Opposition to Motion to Quash or in the Alternative, to Stay Proceedings and Opposition to Motion to Consolidate, fd.
3-17-88	(16)	Motion to Find Defendants in Contempt of Court, fd (feb) FILM
3-24-88	(17)	Pending Motions, Argued. Judge Ross; Mrs. Farwell, Reporter. Motion to find Defendants in contempt. Motion denied. Motion to Consolidate, denied. Motion to Quash or in the Alternative to Stay Proceedings. Motion granted. Motion to Dismiss or in the Alternative to Quash Process. Motion denied.
3-28-88	(18)	Line to re issue, filed. (DRC)

4-5-88		Summons re issued and given to plaintiff for service on:
4-5-88	(19)	Thomas Farasay
4-5-88	(20)	Perpetual Real Estate Services, Inc.
4-20-88	(21)	Motion to Shorten Time Requirement, fd. (bmm)
4-20-88	(23)	Certificate of Service, filed jg
4-20-88	(24)	Certificate of Service, filed jg
5-24-88	(25)	Motion to Dismiss or, in the Alternative, to Quash Process, fd. (LB)
5-24-88	(26)	Requesting for Hearing, filed. (LB)
5-27-88	(27)	Affidavit of Services as to Thomas Farasay President of Perpetual Real Estate Service Inc. served 3-28-88, filed jg
5-27-88	(28)	Affidavit of Service as to Thomas Farasay served 3-28-88, filed jg
6-13-88	(29)	Inter-Office Memorandum to Assignment Office From Judge Ross, Filed. RC
6-13-88	(30)	NOTICE OF HEARING FILED. (RC)
Op 4-20-88	(31)	Affidavit of Service as to Thomas Farasay, President Perpetual Real Estate Serv. Inc, served 3-30-88, filed jg
7-8-88	(32)	Defendant not notified of Hearing Pending Motions to be reset Judge Perry, Mr. Hayden, Reporter Notices to be sent to all parties.
7-22-88	(33)	Motion to Dismiss reset August 9, 1988. Judge Perry.
7-28-88	(34)	NOTICE OF HEARING FILED.

7-28-88	(35)	NOTICE OF HEARING FILED. (mt)
8-9-88	(36)	Motion to Dismiss Or In The Alternative To Quash Process Argued Judge Casula, Mr. Gazdayka, Reporter Motion-Denied 15 days leave given to file response.
8-23-88	(37)	Motion to Dismiss, Fd, (bmm)
8-23-88	(38)	Memorandum in Support of Motion to Dismiss, Fd. (bmm)
8-23-88	(39)	Line Requesting Hearing, Filed. (bmm)
9-7-88	(40)	Opposition to Motion to Dismiss, filed. (bam)
9-7-88	(41)	Leave to File Amended Complaint, filed (bam)
9-7-88	(42)	Amended Complaint and Jury Demand, filed. AY
9-21-88	(43)	Motion to Dismiss and/or to Strike, Points and Authorities, Memorandum in Support of Motion to Dismiss, filed. (LB)
9-21-88	(44)	Line Requesting Hearing, filed. (LB)
9-27-88	(45)	Inter-Office Memorandum to Assignment from Judge Woods, fd
9-27-88	(46)	NOTICE OF HEARING FILED. (mt)
10-7-88	(47)	Opposition to Motion to Dismiss and/or to Strike, Points and Authorities, filed. (bam)
10-13-89	(48)	Amended Complaint of October 12, 1988, Jury Demand, Exhibits and line, filed. AY

10-13-88	(49)	Summons issued and given to attorney for service on Thomas P. Smith, Esq. AY
10-19-88	(50)	Line requesting hearing for LN
10-19-88	(51)	Motion to dismiss and or strike fd LN
10-28-88	(52)	Judge Perry ill Continued to November 4, 1988 before Judge Perry.
11-4-88	(53)	Defendant's Motion To Dismiss, argued. Judge Perry; Mrs. Petix, Reporter. Motion granted without leave to amend.
11-4-88		Judgement entered in favor of the Defendants for costs. All Claims complete; Case closed statistically. COTT dj
11-14-88	(54)	Line Requesting Filing, fd. mm FILM
11-14-88	(55)	Motion for In Ban Review, fd. mm
12-7-88	(56)	Motion To Dismiss Request For In Banc, Points And Authorities, And Memorandum In Support Of Motion To Dismiss And Exhibits, Filed (DB)
12-7-88	(57)	Defendants In Banc Memorandum, Filed (DB)
12-16-88	(58)	Order setting Hearing before the Court in Banc, is set for 2-16-89, signed by (Judge Loveless), on 12-13-88, copies sent by Court, fd. sms
2-2-89	(59)	Motion to Join Additional Plaintiff, fd. mm

2-2-89	(60)	Motion to Strike the Appearance of Attorney John Miled, fd. mm FILM
2-8-89	(61)	Motion Ne Recipiatur or in the Alternative an Opposition to Motions to Join and Strike fd. mm
2-2-89	(62)	Copies of/ Motion for In Ban Review, fd. mm
2-16-89		In Banc Hearing, Judge Rea; Judge Briscoe; Judge Salmon; Mr. Goldman, Reporter. Motion To Join Additional Plaintiff, denied. Motion Ne Recipiatur granted. Motion To Strike the Appearance of Attorney John Miles, denied. Defendants Motion to Dismiss In Banc Appeal granted.
2-16-89		All Claims complete. Case closed statistically.
2-16-89	(63)	In Banc Hearing (argument of E. Davis) filed in Open Court. COTT dj
2-17-89	(64)	Order of Court dated 2-15-89 (Judge Loveless) ORDERED that the Honorable James P. Salmon is hereby Substituted to serve as a member of said In Banc Panel in the place and stead of the Honorable Graydon S. McKee, III. In Banc hearing set for 2-16-89, f.d mm copies sent by court to J. Miles, E. Davis, V. Davis, J. Rea, J. Briscoe, G. Mckee.
6-20-89	(65)	Copies of Order Denying Petition for Writ of Certiorari, fd. (Judge Murphy) je

APPENDIX B

IN THE
COURT OF APPEALS
OF MARYLAND

Petition Docket No. 52
September Term, 1989
(No. CAL 7-20139-Circuit Court for Prince George's County)

VERNON C. DAVIS et ux.
v.
THOMAS FARASY, et al.

ORDER

Upon consideration of the petition for writ of certiorari to the Circuit Court for Prince George's County and the Motion to Dismiss and Opposition filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: June 15, 1989

APPENDIX C

IN THE

COURT OF APPEALS

OF MARYLAND

Petition Docket No. 52
September Term, 1989
(No. CAL 7-20139, Circuit Court for Prince George's County)

VERNON C. DAVIS, et ux.
v.
THOMAS FARASY, et al.

ORDER

Upon consideration of the motion for reconsideration filed in the above entitled case, it is this 31st day of August, 1989

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

/s/ Robert C. Murphy
Chief Judge